In the High Court of Judicature at Madras

Dated:29.01.2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.440 OF 1997

Alamelu Ammal ..Appellant/Plaintiff

v

Ramanujam ..Respondent/Defendant

This second appeal is filed against the judgment and decree dated 28.6.1996 made in A.S.No.47 of 1994 on the file of Sub Court, Tindivanam reversing the Judgment and decree dated 13.1.1992 made in O.S.No.245 of 1990 on the file of the Court of District Munsif, Gingee.

For Appellant : Mr.R.G.Annamalai
For Respondent : Mrs.N.Mala

JUDGMENT

This appeal has been preferred against the Judgment and decree in A.S.No.47 of 1994 on the file of Sub Court, Tindivanam. The plaintiff who won before the trial Court, but lost her case before the first appellate Court, is the appellant herein.

2. The short facts of the case of the plaintiff in the plaint relevant for the purpose of deciding this appeal are as follows:
On 11.1.1986 the plaintiff had executed a promissory note for a consideration of Rs.2,500/- agreed to pay 12% interest per annum. The defendant has not repaid the amount in spite of several demands and finally issued a lawyer's notice on 21.8.1989. Since the defendant is an agriculturist, the plaintiff restricts his interest at the rate of 9% per annum. Hence the suit.

3. The defendant in his written statement would contend that the suit promissory note was not executed by him and no consideration passed and that the suit promissory note is a forged one. He had borrowed a sum of Rs.1,200/- in the year 1986 from one Ramachandra Maistha but the promissory note was executed for Rs.2,500/- including the interest. Even one month before the expiry of the limitation period, the said debt was discharged by the defendant and when the defendant asked for the return of the promissory note, the plaintiff

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had promised to search the same and returned the same as early as possible. Afterwards, the plaintiff, with the help of the signature found in the earlier promissory note, has forged the suit promissory note. Hence the suit is liable to be dismissed.

4. On the above pleadings, the trial Court had framed five issues for trial. On the side of the plaintiff, Plaintiff has examined herself as P.W.1 and also examined the scribe of the promissory note as P.W.2 and also marked Ex A1 promissory note. On the side of the defendant, Defendant has examined himself as D.W.1 and also examined another witness D.W.2 and marked Ex B1 dated 21.8.1989 notice issued by the plaintiff through her lawyer to the defendant and Ex B2 dated 24.1.1990 reply notice sent by the defendant to the plaintiff's counsel.

5. After going through the oral and documentary evidence, the learned trial Judge has come to a conclusion that the plaintiff is entitled to a decree as prayed for and accordingly decreed the suit with costs, and with a direction to the defendant to repay the debt amount within three months. Aggrieved by the Judgement of the learned trial Judge, the plaintiff has preferred A.S.No.47 of 1994 before the Sub Court, Tindivanam who has reversed the findings of the learned trial Judge on the ground that there is a discrepancy seen in the admitted signature of the defendant with that of the signature found in the suit promissory note Ex A1 and that the plaintiff has failed to examine one of the witnesses to the suit promissory note and that Ex B1 notice , the date of the suit promissory note has been mentioned wrongly. Since the plaintiff is not satisfied with the reasoning given in the Judgment of the first appellate Court, she has preferred this second appeal.

6. The substantial question of law involved in this appeal is

" 1. Whether the lower Appellate Court is correct in law in its findings as to Ex A1 as against the provisions of Section 88 of the Negotiable Instruments Act, 1881?
Courts below are right in upholding the oral partition pleaded by the defendant?
2. Whether it is not the duty and burden of the respondent/defendant to prove that Ex A1 is not a valid document as per Sections 102 and 103 of the Indian Evidence Act?
3. Whether the lower appellate Court is correct in law in reversing the valid findings of the trial Court?

7. The Points:

Section 88 of the Negotiable Instruments Act reads as follows:

"Acceptor or indorser bound not withstanding previous alteration: An acceptor or indorser of a negotiable instrument is bound by his acceptance

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or indorsement notwithstanding any previous alterations of the instrument."

The defence taken by the defendant in his written statement is that Ex A1 promissory note is a forged one and that he had executed an earlier promissory note in favour of the husband of the plaintiff viz., Ramachandran and that even that promissory note was executed for double the amount over and above, he had received from the plaintiff and that he has already discharged the said promissory note, the plaintiff has failed to return the said promissory note, but forging the signature of the defendant in the earlier suit promissory note in Ex A1 the same was brought into existence for the purpose of the case. The first appellate Court has compared the admitted signature of the defendant in the vakalat, deposition with that of the disputed signature in Ex A1 promissory note and has come to a conclusion that both the signatures do not tally and that Ex A1 is a forged one. But when the defendant has taken a definite plea in his written statement that Ex A1 is a forged one, the burden shifts on the defendant to prove the same. But the defendant has not taken any steps to send the promissory note Ex A1 to get an expert opinion with regard to the genuineness or otherwise of the same. Even under section 73 of the Indian Evidence Act, the Court is competent to compare the disputed signature with that of the admitted signature. If we compare the signature found in Ex A1 with that of the admitted signature of the defendant in the vakalat filed by the defendant before this Court and that of the admitted signature contained in his deposition and in the written statement will clearly go to show that the signatures contain in the vakalat in the deposition and in Ex A1 are belonged to one and the same person. Viz., the defendant. Particularly the characteristic of letters "G" "ர" "ஹ" "ம்" exactly tally with the said letters found in the signature in Ex A1 promissory note. So under such circumstances, the defendant cannot take shelter under Section 88 of the Negotiable Instruments Act. Yet another reason in the first appellate Court's Judgment is that the failure of the plaintiff to examine an attestor to Ex A1 as a witness to prove the case, cannot also be sustainable because the promissory note is not a "Will" to be attested by at least two witnesses and not to be proved by examining at least one of the attesting witnesses as contemplated under Section 68 of the Indian Evidence Act.

8. The plaintiff has examined herself as P.W.1 and also examined another witness P.W.2 who is the scribe in Ex A1. P.W.2 has corroborated the evidence of P.W.1 in respect of the execution of the promissory note and also for passing of consideration. The other point under which the first appellate Court rejected the claim of the plaintiff is in Ex B1 notice, the date of the promissory note has been wrongly mentioned as 11.9.1989. But the actual date found in Ex A1 is 11.9.1989. The date mentioned in Ex B1 is clearly an error apparent on record because even on the right hand side column in Ex B1, the date of notice has been mentioned as 21.8.1989. For a

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promissory note said to have been executed on 11.9.1989,it is impossible to send a notice on 21.8.1989. So it will clearly go to show that it is an error apparent on record. So under such circumstances, this Court is compelled to interfere with the findings of the first appellate Court in A.S.No.47 of 1994. The points are answered accordingly.

9. In the result, the appeal is allowed and the decree and Judgment in A.S.No.47 of 1994 on the file of the Court of Subordinate Judge, Tindivanam is hereby set aside and the Judgment of the trial Court in O.S.No.245 of 1990 is restored. The suit is decreed as prayed for with costs through out. Time for payment within two months from the date of receipt of a copy of this order.

sg

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Subordinate Judge, Tindivanam
(with records if any)

2. The District Munsif, Gingee

3. The Section Officer, VR Section,
High Court, Madras.

1 CC TO MRS. N. MALA, ADVOCATE SR NO 5210

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